

# TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PIPION COBELL, et al.

Appellee,

v.

No. 02-5374

GALE A. NORTON, SECRETARY  
OF THE INTERIOR, et al.

Appellants.

ALAN LEE BALARAN, SPECIAL MASTER,  
et al.

Pages 1 through 59

Washington, D.C.

Date:

Thursday, April 24, 2003

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Plaintiffs/  
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No. 02-5374

GALE A. NORTON, SECRETARY  
OF THE INTERIOR, et al.

Defendants/  
Appellants;

ALAN LEE BALARAN, SPECIAL  
MASTER, et al.

Thursday, April 24, 2003

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The above-entitled matter came on for oral argument,  
pursuant to notice,

BEFORE: CHIEF JUDGE GINSBURG AND CIRCUIT

JUDGES HENDERSON AND RANDOLPH

COURT OF APPEALS FOR THE D.C. CIRCUIT.

APPEARANCES:

MARK B. STERN, For the Appellants

ELLIOTT H. LEVITAS, For the Appellees

*Deposition Services, Inc.*

# C O N T E N T S

## ORAL ARGUMENT OF:

## PAGE:

Mark B. Stern

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Elliott H. Levitas

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## P R O C E E D I N G S

CLERK: Stand, please. O yea, O yea, O yea, all persons having business before the Honorable, the United States Court of Appeals for the District of Columbia Circuit are admonished to draw near and give their attention for the Court is now sitting. God save the United States and this Honorable Court. Be seated, please.

Case number 02-5374, Elouise Pepion Cobell, et al. versus Gale A. Norton, Secretary of the Interior, et al., Appellants; Alan Lee Balaran, Special Master, et al. Mr. Stern for the appellants, Mr. Levitas for the appellees.

MR. STERN: May it please the Court, in its previous decision, this Court affirmed the District Court's decision to retain jurisdiction over this case, but made clear several crucial points. First, the Court emphasized that this was not and could not properly be a case about wholesale systemic reform. Second, the Court made clear that the actionable duty at issue in this case is the performance of an accounting and not a broad variety of matters related to trust reform generally. And third, the Court explicitly admonished the District Court to be mindful of the limits of its jurisdiction and explained that those limits would likely be to determine whether further action on remand was so defective as to constitute further unreasonable delay.

1           The District Court's conduct of this case on  
2 remand culminating in the orders now on review departs in  
3 crucial respects from this Court's mandate and from basic  
4 principles of judicial review of executive branch action.  
5 Contrary to this Court's mandate, the District Court has  
6 transformed this case into litigation about institutional  
7 reform generally and has assumed control over all matters of  
8 Indian trust reform as if it were in the Court's own view  
9 implementing a decree in institution reform litigation. And  
10 the Court has pursued its broad-ranging mission of trust  
11 reform with the aid of special Masters who have, and  
12 continue to conduct broad-ranging varieties on a variety of  
13 issues and with the aid of a virtually unprecedented use of  
14 the contempt and sanctions of power.

15           JUDGE RANDOLPH: You don't complain about Special  
16 Master Balaran, do you?

17           MR. STERN: Your Honor, we complain -- there are  
18 two questions that are related to the Special Masters, and  
19 one, as you point out, we have a -- we have got a specific  
20 problem with Mr. Kieffer, which we've urged in the brief  
21 that we think he simply cannot properly -- even if a Special  
22 Master were appropriate, it can't be Mr. Kieffer.

23           We have not challenged the use -- the idea that  
24 there be a Special Master in this case. What we do urge is  
25 that the Court provide clear guidance to the District Court

1 to comply with its original mandate in this case --

2 JUDGE RANDOLPH: But have you objected -- there's  
3 evidence at JA 439, JA 479 that Mr. Balaran is within the  
4 bowels of the Department of Interior pulling documents out  
5 of shredders and going around and questioning witnesses.  
6 It's a really odd function to be -- for a Special Master.  
7 He sounds more like a Special Investigator, yet you haven't  
8 objected to that so far as I can tell.

9 MR. STERN: Your Honor, to the extent that we --  
10 what we believe is this: that if this case is put back on  
11 the right track of judicial review of the agency's  
12 accounting plan, which has been filed with the District  
13 Court, and we don't think the District Court should have  
14 required that on a time table, but it's been filed, the  
15 agency stands behind it just as if it had been published in  
16 the Federal Register in the first instance. And what we're  
17 asking now is that this Court say to the District Court,  
18 consistent with what it said in its earlier opinion, we want  
19 you to review that accounting plan to the extent to  
20 determine, consistent with normal APA review, does that plan  
21 constitute further unreasonable delay. And with that  
22 guidance, we think that the untoward conduct of the Special  
23 Masters, which we do think is wrong, even though we haven't  
24 complained separately of every single aspect of this case  
25 that we think is wrong, we think that once this case is put

1 back on the right track, that the problems with -- that are  
2 inherent in the way these special masters are being used  
3 will be dealt with by that, and that's why we've urged this  
4 the way we -- it's not that we don't think that they're huge  
5 problems with the investigations that are being conducted  
6 both by Special Master Balaran and, of course, by Mr.  
7 Kieffer who's got his own separate problems about recusal.

8 JUDGE GINSBURG: Mr. Stern, let me back you up a  
9 little bit to the jurisdictional issues that are addressed  
10 in the brief. I gather your principle argument for the  
11 Court's having jurisdiction for this interlocutory review is  
12 that this is, in fact, an injunction -- the order is, in  
13 fact, an injunction.

14 MR. STERN: We think both that it's -- we think  
15 that it's an injunction. We think that it's a -- that  
16 because of the way this case is played out, there's also --  
17 the Court's order also is effectively a modification --

18 JUDGE GINSBURG: All right, what does it enjoin  
19 you to do?

20 MR. STERN: We think that -- that primarily what  
21 it is is a prohibit -- it is largely a prohibitory  
22 injunction, though of course it has a mandatory component.  
23 That what we're being told to do is -- I'd like to make  
24 clear what we're not here to complain about is the fact that  
25 we were told to file plans for the -- one plan for the

1 accounting and one --

2 JUDGE GINSBURG: Well, that seems to be the only  
3 mandatory portion of the order.

4 MR. STERN: I think -- I think that what -- but  
5 what it looks forward to, Your Honor, is a mandate in which  
6 the District Court is able to dictate to the Department of  
7 the Interior how to proceed, not only with an accounting but  
8 with all aspects of trust reform.

9 JUDGE GINSBURG: What do you mean what it looks  
10 forward to?

11 MR. STERN: Well, what the District Court has said  
12 in this case is that it has based its ruling on what it  
13 perceives to be the status of trust reform. It said that  
14 the Secretary of the Interior is an unfit trustee. It said  
15 that because of that it's --

16 JUDGE GINSBURG: What does it mandate?

17 MR. STERN: Well, I think that what it has  
18 mandated is the filing of a plan, but the filing of the plan  
19 is the first step in --

20 JUDGE GINSBURG: It does mandate filing a plan.

21 MR. STERN: That's right.

22 JUDGE GINSBURG: But you don't object to that.

23 MR. STERN: We object to it, but that's happened  
24 and we're not trying to unwind the clock.

25 JUDGE GINSBURG: The filing of the -- if that's



1 all that we're here is in order to file a plan, would you  
2 have an appealable injunction?

3 MR. STERN: I -- I'm fairly sure we wouldn't be  
4 here whether it was appealable or not.

5 JUDGE GINSBURG: It would be like an order to show  
6 cause, right? Or, an order to file a brief.

7 MR. STERN: No, I mean --

8 JUDGE GINSBURG: It's just moving the litigation  
9 along.

10 MR. STERN: -- you know -- I mean, the 2nd  
11 Circuit's decision in Dunn makes -- you know, holds that a  
12 order that's very similar to that is appealable as of right.  
13 I mean, I don't think the position we're taking here is  
14 without support, but I guess what I'd also like to --

15 JUDGE GINSBURG: Well, you're past the liability  
16 phase. There has to be some reform of the trust, right?  
17 So, the Court says submit a plan. I mean, it's -- you said  
18 you wouldn't be here if that's all there were.

19 So, tell me again what is it that is in the order.

20 MR. STERN: Your Honor -- Your Honor, just --  
21 could I just address one premise of that question, which is  
22 that we're past the liability phase and there now has to be  
23 trust reform. Because that's a framework of analysis that  
24 the District Court has employed that we think is  
25 fundamentally wrong. I think this case came to this Court,

1 the Court reviewed it under the APA, it reviewed it as a  
2 case of unreasonable delay. What happens in a case of  
3 unreasonable delay is that it gets remanded to the agency  
4 and then at a subsequent point, if it turns out that the  
5 agency has stilled stalled in its tracks and isn't moving,  
6 maybe at that point based on further evidence, a District  
7 Court could order deadlines. But it could also only order  
8 deadlines about things that are actually within its  
9 jurisdiction, which would be the performance of an  
10 accounting.

11 JUDGE GINSBURG: Of course. So, let's just go  
12 back to the order and tell me what it is that it requires  
13 that gives us interlocutory jurisdiction?

14 MR. STERN: Well, we do think that, in fact, the  
15 filings -- that the filing of the plan initiates a process  
16 in which the District Court in effect has asked the  
17 Secretary to recognize the Court as a de facto receiver and  
18 the Secretary has been invited to resign forthwith if she's  
19 got a problem with that.

20 But I would also emphasize, Your Honor, that even  
21 if this Court were to conclude that this was not appealable  
22 as of right, which we think that it is, that if the Court  
23 agrees with our understanding of what's gone wrong in this  
24 case, that the nature of the error and the magnitude of the  
25 error and the immediate and ultimately remediable

1 consequence of it are such that this is a plain -- plainly  
2 appropriate instance in which -- for the Court to exercise  
3 its supervisory jurisdiction to put a case back on track and  
4 to compel compliance with the earlier mandate in this case.

5 And this is not a case in which we are ever likely  
6 to have an appeal from a final judgment at any time in the  
7 foreseeable future. The District Court, at the end of its  
8 contempt order, says that it doubts whether its life tenure  
9 will be sufficient to see it through the supervision of this  
10 case.

11 JUDGE GINSBURG: Well, this case is shot through  
12 with hyperbole as you know. There's some very peculiar  
13 dialogue that's going on down there.

14 Your other point in the opening of the brief was  
15 that this is really a criminal contempt -- functionally  
16 should have been denominated a criminal contempt. Then it  
17 was appealable as such.

18 MR. STERN: What we think, Your Honor, is that it  
19 could -- this is not -- I mean, traditionally civil  
20 contempt, you know, as the Court is well aware, the notion  
21 of it is, you know, we're trying to compel compliance with  
22 someone. That's the idea. You've got the key to the  
23 jailhouse door or whatever.

24 This is a wholly --

25 JUDGE RANDOLPH: They're requiring somebody to do

1 what the Court has ordered them to do.

2 MR. STERN: That's right --

3 JUDGE RANDOLPH: That's the nature of civil  
4 contempt.

5 And your point is that that's impossible to fit within some  
6 of these specifications -- maybe all of them -- because  
7 there's nothing you can do about September, 1999. It's  
8 over. It's gone. If a report was misleading, that -- he  
9 never -- Judge Lamberth never ordered you to redo the  
10 reports, did he?

11 MR. STERN: No. That's exactly right. There's  
12 nothing -- there's no question of our being ordered to do --  
13 saying, you know, you have to do something to cure -- to  
14 cure the contempt. It's a wholly retrospective judgment  
15 about things that should or should not have happened years  
16 ago.

17 JUDGE RANDOLPH: This notion that an individual  
18 officer of the government can be held in civil contempt for  
19 actions of the predecessor. Did you object to that?

20 MR. STERN: Well, Your Honor, the -- what is --  
21 the Court went out of its way to make clear, and I think  
22 that this was appropriate, that Secretary Norton is not a  
23 party in her personal capa -- is not a party in her personal  
24 capacity, as opposed to her official capacity.

25 JUDGE RANDOLPH: Well, that's fine, but she's

1 being held in contempt --

2 MR. STERN: No, that's --

3 JUDGE RANDOLPH: -- in her official capacity, and  
4 that has repercussions even if there's no order that forces  
5 -- it's a slap on her reputation.

6 MR. STERN: Yes, Your Honor. We agree with that.

7 JUDGE RANDOLPH: Whether it was in her official  
8 capacity or not and -- I'm just asking where -- where did --  
9 did the Department object to the idea that a government  
10 official can be held liable in their official capacity or  
11 whatever for actions taken by that person's predecessor?

12 MR. STERN: Yes, I'm fairly sure that in our  
13 findings -- proposed findings of fact and conclusions of law  
14 we specifically raised that point with the District Court,  
15 and one problem -- and as we've pointed out on appeal,  
16 although the Court styles this -- you know, and correctly as  
17 official capacity contempt, that the Court has not only  
18 personalized -- personalized this decision in a way that  
19 causes reputational injury, but in fact the Court really is  
20 concluding -- I mean, this is what's really important here.  
21 The Court really is saying you personally are an unfit  
22 trustee delegate -- I mean, and therefore, I'm doing things.  
23 You personally take your place along with Secretary Babbitt  
24 in the pantheon of unfit trustee delegates and it is because  
25 I am concluding that that I'm taking over not just the

1 accounting, but also trust reform which was -- I was told by  
2 this Court what was not part of the immediate mandate of  
3 this case.

4 JUDGE RANDOLPH: Are you familiar with the Supreme  
5 Court decision in Spooner v. Littleton?

6 MR. STERN: I'd have to say I'm not, Your Honor.

7 JUDGE GINSBURG: That's why it wasn't cited in any  
8 of the briefs, I'm sure.

9 JUDGE RANDOLPH: It's a case in which an  
10 individual was sued in their official capacity and during  
11 the course of the litigation, they left office and were  
12 replaced. And the Supreme Court held in that situation the  
13 acts charged against the individual in their official  
14 capacity are moot. They become moot.

15 JUDGE GINSBURG: Actually, I think -- mandatory  
16 determination of mootness.

17 JUDGE RANDOLPH: Well, we've held it becomes moot.

18 JUDGE GINSBURG: Mr. Stern, some of these  
19 specifications on the -- for contempt relate back to the  
20 predecessor's conduct, as well as the incumbent's conduct.  
21 Others may relate solely to the predecessor. So, insofar as  
22 the predecessor's conduct is not chargeable as contempt, we  
23 would still be left with the continuing charges. And there  
24 seem to be at least a couple. Reports starting in March,  
25 2000 regarding TAAMS and BIA data cleanup seems to be from

1 March, 2000 to the present when the order was issued.

2 MR. STERN: I think that that has a terminal date  
3 on it --

4 JUDGE GINSBURG: Well, it's not in the charge.  
5 Maybe there was a last report and you could tell us when  
6 that is.

7 JUDGE RANDOLPH: It's only through the seventh  
8 quarterly report --

9 MR. STERN: Yes. I mean, it doesn't -- because,  
10 yeah, and -- I think they went into --

11 JUDGE RANDOLPH: And that was filed in August?

12 MR. STERN: -- Secretary Norton's tenure. I mean,  
13 this could -- there's some small -- I mean, you're  
14 absolutely right, Chief Judge Ginsburg, that it  
15 does --

16 JUDGE GINSBURG: Then the last specification is  
17 also about reports starting in March, 2000; this one  
18 regarding computer security of the trust data. Again, it  
19 would lap over into the Secretary Norton's --

20 MR. STERN: That's right. There's sort of a kind  
21 of sort of very tail end, because Secretary Norton, of  
22 course, doesn't take office until January of 2001. So, some  
23 of these -- but you're quite right, that some -- that --

24 JUDGE GINSBURG: So, the case isn't going to go  
25 away if the -- if the problem -- insofar as there's a

1 problem with identifying the contempt with the conduct of  
2 the previous secretary.

3 MR. STERN: No, that's right. But, of course, we  
4 think that that conduct -- you know, the conduct that takes  
5 place starting 2001 forward, just like all the other conduct  
6 preceded it, there is -- there's certainly no contempt in  
7 the sense of violation of a clear, specific court directive.  
8 The District Court points to none. Plaintiffs in their  
9 brief point to absolutely nothing. So, there's certainly,  
10 despite the very stigmatizing label of contempt as if the  
11 Court -- as if the Secretary had defied a court order, it is  
12 absolutely clear that she defied no order of any kind. Then  
13 what we have are the fraud on the court --

14 JUDGE GINSBURG: Well, the first specification is  
15 litigation misconduct by failing to comply with the Court's  
16 order of December 21, 1999 to initiate an historical  
17 accounting project. Is that a continuing matter?

18 MR. STERN: No. There's -- because part of what  
19 the District Court, in fact, does with that is to discount a  
20 lot of evidence it proffers because it says it came out  
21 beyond the time frame that it was interested in. And so --  
22 I mean, all of these things are -- by time frames, so at a  
23 lot of points when the government was saying, well look at  
24 what we've done, look at these things, the Court says, oh,  
25 no, no, no I don't want to even hear about that. That was,



1 you know, sort of more than six months after the Court of  
2 Appeals decision issued.

3 JUDGE GINSBURG: Suppose -- just to finish this  
4 up. Suppose we buy your alternative -- your footnote  
5 argument that this is really a criminal contempt denominated  
6 improperly -- denominated as civil contempt, that was  
7 addressed to the jurisdictional -- interlocutory  
8 jurisdictional issue. Does it have any -- or, are you  
9 raising any other implications based on that assertion? In  
10 other words, with regard to the standard of proof or  
11 evidentiary rulings or anything else?

12 MR. STERN: Well, I think that certainly to the  
13 extent that it's regarded that way that the evidentiary  
14 burdens or the standards of proof would have to follow. But  
15 we think --

16 JUDGE GINSBURG: But you're not raising that in  
17 the brief, are you?

18 MR. STERN: We have not --

19 JUDGE GINSBURG: Okay.

20 MR. STERN: -- but that's because, Your Honor, it  
21 seems to us so clear that under any standard of review we:  
22 A, don't have contempt; and, B, we don't have fraud on the  
23 Court. I mean --

24 JUDGE GINSBURG: I'm just trying to nail down  
25 jurisdiction, Mr. Stern. Just let's finish with that, okay?

1 MR. STERN: Right.

2 JUDGE GINSBURG: All right, Judge Randolph?

3 JUDGE RANDOLPH: On the fifth specification, which  
4 dealt with the security of the system, in reading through  
5 Judge Lamberth's findings of fact, I can't find anywhere  
6 where he brings that home to Secretary Norton.

7 MR. STERN: No, he doesn't.

8 JUDGE RANDOLPH: And so that raised a question, is  
9 it -- can someone be held in civil contempt in their  
10 official capacity on a respondeat superior theory?

11 MR. STERN: I think that Judge Lamberth's view of  
12 this is that he's holding the Department in contempt so  
13 that, yes, there would be a kind of respondeat superior  
14 theory, but --

15 JUDGE RANDOLPH: For the Department I can  
16 understand that, but for an individual officer of the  
17 Department?

18 MR. STERN: Clearly not, Your Honor.

19 JUDGE RANDOLPH: I just don't know of any law on  
20 that and he cites none.

21 MR. STERN: Your Honor, we're not aware of any law  
22 because we -- we've -- I mean, it is -- it's extraordinary  
23 to take actions of this kind and to conclude -- to lay this  
24 -- we're not looking at a situation in which the Attorney  
25 General is told, "Produce a document and if you don't

1 produce the document, we're going to hold you, you know, in  
2 contempt." That -- I mean, that --

3 JUDGE RANDOLPH: Well, that theory has far-  
4 reaching implications. An assistant U.S. attorney operating  
5 in one of the districts does something that causes that  
6 assistant U.S. attorney to be held in civil contempt and the  
7 Judge might as well throw the Attorney General in, too.

8 MR. STERN: That's exactly right, Your Honor, and  
9 particularly in this case where the bottom line of all of  
10 this is a conclusion that the Secretary of the Interior --  
11 the real Secretary of the Interior is an unfit delegate, who  
12 has to be set aside. So, I mean, there's a real way in  
13 which this is working back so that a lot of actions which  
14 have absolutely -- which, even if there were thought to be a  
15 problem with them, which we think there clearly is not, it  
16 couldn't possibly support the conclusion that you have a  
17 Secretary of the Interior who's not a proper delegate and in  
18 any rate, no District Court should be attempting to conclude  
19 whether sitting cabinet officers are fit to perform their  
20 duties, and no District Court should be thinking that it has  
21 the power to make itself a de facto receiver over a  
22 government program, and this Court's previous decision  
23 certainly makes it clear that that isn't the appropriate way  
24 to go on this.

25 JUDGE GINSBURG: Mr. Stern, on the question of the

1 Monitor, you assert in the brief that the Monitor could not  
2 properly be appointed -- or, reappointed I should say over  
3 the government's objection. What's the source of law for  
4 that?

5 MR. STERN: We don't think that -- to -- I mean,  
6 if we look at what the Monitor is -- either was doing or is  
7 doing in his new guise, what the Monitor was is a person  
8 who's been charged with going and requisitioning information  
9 and whether you -- however you describe him, Judge  
10 Lamberth's theory about this Monitor and the reason why he  
11 says that we can't even assert attorney/client privilege in  
12 the face of any document requests that are initiated, is  
13 that the Master or the Master Monitor are arms of the Court,  
14 and that all the information that they seek isn't discovery,  
15 says Judge Lamberth; that this is the Court requesting  
16 information and --

17 JUDGE GINSBURG: So, how is it -- I mean, if the  
18 Court said, "I want to come visit your factory. I want to  
19 see the site of the accident. I want to do something on  
20 your premises", would he need your permission for this?

21 MR. STERN: Yes, Your Honor. I don't think that a  
22 District Court can go and conduct an impromptu -- I mean,  
23 this is not, contrary to Judge Lamberth's understanding,  
24 he's not implementing a decree in institutional reform  
25 litigation. We're here -- to the extent that something is

8 JUDGE RANDOLPH: Why is it -- Mr. Stern, you --  
9 you say that a Monitor, an investigator basically is what's  
10 going on here, can't be appointed by the Court without the  
11 consent of the parties. And the -- I'll ask your opponents.  
12 They don't seem to respond to that at all in their brief,  
13 but what law do you have to back that up?

14 MR. STERN: Your Honor, it's the function -- I  
15 mean, I don't know what -- the Court Monitor in this case --  
16 I mean, there is no -- I mean, the Court Monitor isn't a  
17 recognized position. What the Monitor in this case has been  
18 someone who goes and requisitions documents and we don't  
19 know of any authority for a person to have that -- who can  
20 do things like that, who's not either a judicial officer or  
21 someone who the parties have consented to --

22 JUDGE RANDOLPH: What happens to the -- whatever  
23 the Monitor requisitions, what happens to that material?

24 MR. STERN: Well, we don't exactly know, Your  
25 Honor. What the District Court said in its March 4th

1 opinion is that anything that either the Master Monitor or  
2 the Special Master requisitions, the government has to  
3 produce it and that then if it's going to be produced in  
4 further reports, at that time when it's going to be made  
5 public, the government can at that point object on various  
6 grounds of privilege. But --

7 JUDGE RANDOLPH: Was there any indication that the  
8 Monitor is having, for example, private conversations with  
9 the Judge?

10 MR. STERN: Your Honor, I point you to -- I mean,  
11 I think there are two things. First, you've got petitions  
12 that go into this in rather considerable detail -- mandamus  
13 petitions by individual attorneys who moved to recuse Judge  
14 Lamberth and recited, at great length, and analyzed the  
15 billing hours of the Master -- or the Judge and the Master  
16 Monitor and the discussions they had.

17 JUDGE RANDOLPH: Where is that -- there's another  
18 mandamus petition in this Court?

19 MR. STERN: Yes, you've got several mandamus  
20 petitions that this panel has and is effectively holding in  
21 abeyance pending on this appeal. And the District Court  
22 addresses these motions in its order of -- I think it's  
23 January 7th of this year, and the Court talks extensively  
24 about what its contacts with Mr. Kieffer had been. It's  
25 abundantly clear that there were very extensive contacts

1 with Mr. Keiffer and the District Court says --

2 JUDGE RANDOLPH: Without the parties being  
3 present?

4 MR. STERN: Oh yes, absolutely without the parties  
5 being present. And, indeed, when the govern --

6 JUDGE GINSBURG: But that's the subject of the  
7 other petitions.

8 MR. STERN: That's the subject of the other  
9 petitions.

10 JUDGE GINSBURG: As I understood your objection  
11 here to the Monitor -- well, first it was that the  
12 reappointment couldn't be valid over the objection of a  
13 party. Really that was all, I think, for the reappointment.  
14 Isn't that right?

15 MR. STERN: The -- we objected to the  
16 reappointment and to the elevation --

17 JUDGE GINSBURG: Well, that's now the Master, but  
18 that's the -- whatever the second title is.

19 MR. STERN: Okay.

20 JUDGE GINSBURG: But dealing just with the  
21 Monitor --

22 MR. STERN: Right.

23 JUDGE GINSBURG: -- am I not correct that your  
24 only objection in this proceeding is that the appointment  
25 was made over the objection of the party.

1 MR. STERN: No, Your Honor.

2 JUDGE GINSBURG: Okay --

3 MR. STERN: We also pointed out that --

4 JUDGE GINSBURG: -- what else is it?

5 MR. STERN: -- that in that order the -- at the  
6 time that we moved for the revocation of the Monitor's  
7 appointment, we cited to the District Court what we believed  
8 to be very improper conduct by the Monitor at a meeting in  
9 April of last year with several --

10 JUDGE GINSBURG: The April 19 meeting?

11 MR. STERN: That's correct, Your Honor. And --

12 JUDGE GINSBURG: But the -- but you're -- okay.  
13 So, you're now saying that the -- it was improper to appoint  
14 the Monitor in light of the events of April 19th -- to  
15 reappoint the Monitor?

16 MR. STERN: Yes, but I'd like to make the  
17 additional point that what --

18 JUDGE GINSBURG: Because let me just make  
19 something clear. It seemed to me that the conduct of April  
20 19th formed a basis for your -- the conditions that you  
21 proposed to the Court for your consent to the appointment.

22 MR. STERN: No, there are two separate problems.  
23 One, we originally -- the Court -- we consented to the  
24 appointment of the Monitor for a term of a year --

25 JUDGE GINSBURG: That was the first appointment.



1 MR. STERN: That was the first year and that's --  
2 nobody's talking about --

3 JUDGE GINSBURG: All right, that's out of this;  
4 yeah.

5 MR. STERN: Then we've got -- then we said, look,  
6 we'll consent to the reappointment, but we can't have the  
7 Monitor go on the way that he's gone; we've got to limit --

8 JUDGE GINSBURG: There were conditions.

9 MR. STERN: -- on conditions. The Court doesn't  
10 put in the conditions and reappoints him anyway.

11 JUDGE GINSBURG: Right, and now that's the basis  
12 for your saying he was appointed over the objection of a  
13 party.

14 MR. STERN: That's right, but there's an  
15 additional problem --

16 JUDGE GINSBURG: Okay, go on.

17 MR. STERN: -- and that's the April 19th meeting.  
18 And the April 19th meeting had what we believed -- and it's  
19 laid out in the brief and in the appendix, had what we  
20 believe were very improper discussions between the Monitor  
21 -- I mean, the fact of the discussions was not itself  
22 improper, but the content was.

23 JUDGE GINSBURG: Well, I had interpreted your --  
24 maybe I misremember this, Mr. Stern, but I thought your --  
25 that at this stage in the litigation, your objections to the  
26 conduct of April 19th are wrapped into your objection to the

1 elevation of Mr. Kieffer; not to the reappointment of Mr.  
2 Kieffer.

3 MR. STERN: Well, they largely are. I just wanted  
4 to make one point; that in denying that motion, the Judge  
5 addressed the April -- what happened and when the Judge did  
6 that -- and this we do raise specifically -- the Judge said,  
7 now I have personal knowledge that everything you say here  
8 fails of its own mendacity. And what we have said is that  
9 to the extent that the District Court was, in fact -- and  
10 that is clear that he did, and his subsequent January order  
11 also makes clear that he really was relying on personal  
12 knowledge in this matter, that that is wholly improper and  
13 you cannot deny --

14 JUDGE GINSBURG: And goes to the reappointment.

15 MR. STERN: It would go to the reappointment also.

16 JUDGE GINSBURG: I hadn't understood that aspect.

17 Now, let's go to the elevation. There's some evolution  
18 between your first and second briefs I think in this regard,  
19 in that the first brief advances essentially a behavioral  
20 objection to the elevation of the Monitor in light of his  
21 prior conduct, expression of opinions, activity as an  
22 investigator. The gray brief -- your second brief seems to,  
23 at least, bring into clearer focus a somewhat different  
24 objection and a more -- let's say a structural objection,  
25 which is to say someone who has served as an investigator

1 may not be appointed a Special Master, quite without regard  
2 to whether he's expressed opinions or done this or that,  
3 right? Just a per se objection. Which I take it as  
4 something you see as essentially inconsistent with an  
5 adversarial as opposed to a prosecutorial model for  
6 adjudication. You have a judicial officer with  
7 investigative responsibilities; dare we say French approach.

8 The second point I can't find you having presented  
9 to the District Court; the structural objection. It appears  
10 -- at least clearly for the first time, I think, in your  
11 reply brief. There's no response to it possible in the  
12 responsive brief -- or, the red brief because it wasn't  
13 really clearly delineated in your opening brief. Was it  
14 ever put before the District Judge?

15 MR. STERN: Your Honor, I don't know -- I'm sure  
16 it was in our opening brief, I mean because the point that  
17 we made --

18 JUDGE GINSBURG: In your opening brief here.

19 MR. STERN: Yes, because -- I mean, we cited the  
20 7th Circuit's Edgar case in our opening brief, and the point  
21 that we were making with respect to the Edgar case is that  
22 if -- just as you can't have a Judge or by extension and  
23 other judicial officer -- because this Court has held that a  
24 Moni -- that a Master is subject to the same --

25 JUDGE RANDOLPH: Because of 28 USC 455?

1 MR. STERN: Yes.

2 JUDGE RANDOLPH: Did you cite that statute in your  
3 opening brief?

4 MR. STERN: Did we cite 455? Yes -- I mean,  
5 I'm --

6 JUDGE GINSBURG: Yes, but here's what you said at  
7 55 in the opening brief, Mr. Stern. Under 455(b) a judicial  
8 officer, including a Master, is disqualified if he has  
9 personal knowledge of disputed evidentiary facts concerning  
10 the proceeding. Okay?

11 Now, that seems to go not to a per se  
12 disqualification, but rather to -- to be a prelude to your  
13 saying that in this instance that's exactly what happened.

14 MR. STERN: Well --

15 JUDGE GINSBURG: Contrast that with your final  
16 brief -- I'm not sure that I can find the exact passage here  
17 -- in which you do say that they -- that the person who has  
18 -- here it is; at 40 in your final brief. "The government  
19 does not assert that Mr. Kieffer acted improperly in  
20 engaging in ex parte contacts with the parties during the  
21 year in which the government consented to his appointment.  
22 That does not mean that he may now preside in a judicial  
23 capacity. A Judge may not sit on a case that he previously  
24 investigated in a non-judicial capacity."

25 Now, that latter statement has nothing to do with

1 his expressing opinions or the particulars of what he  
2 learned. It is a -- it's a -- I mean, when you leave the  
3 Department, if you ever do, you could not participate in a  
4 case that was subject to your supervision or involvement in  
5 the Department. Ever, right? Doesn't -- it doesn't matter  
6 if you were just nominally responsible for the case and know  
7 nothing about it. It's a structural impediment.

8 Now, where did you put that before the District  
9 Court?

10 MR. STERN: That -- I mean, I am not sure to what  
11 -- how it got there because, remember, the sequence of  
12 events is that we moved for -- to revoke the appointment and  
13 at that point -- at which point we were being held in  
14 contempt --

15 JUDGE GINSBURG: Yeah -- well, no what happened  
16 was on September 17th you got all the news at once --

17 MR. STERN: Right.

18 JUDGE GINSBURG: -- right, that not only was your  
19 objection rejected, but he was going to be elevated to a new  
20 position.

21 MR. STERN: I mean, you're right, Your Honor, that  
22 we did --

23 JUDGE GINSBURG: But you didn't go back --

24 MR. STERN: No, Your Honor.

25 JUDGE GINSBURG: -- right? That's what I thought.



1 JUDGE GINSBURG: Well, we -- but our jurisdiction  
2 for mandamus depends upon their being no alternative avenue  
3 of relief open to you, right?

4 MR. STERN: That's right, Your Honor. The -- I  
5 would just say that in this case the Judge is certainly  
6 aware of every single aspect of this matter. The Judge been  
7 -- the Judge -- and we also know that the petitioners in the  
8 mandamus case went back and called the Judge's attention to  
9 the problem of the ex parte contacts. Again, we know -- I'd  
10 also refer the Court -- Judge's, I think it's January -- I  
11 think January 7th ruling -- it's in F. Supp. 2nd -- you  
12 know, on that. I don't think that were in any doubt about  
13 what the District Court, who had -- who knows that he had  
14 personal contacts with the Master himself -- with the Master  
15 Monitor himself, knew that the Master Monitor had extensive  
16 ex parte contacts, told us that our motion failed of its own  
17 mendacity when we sought to remove him, and then insisted  
18 that he be appointed as a Special Master while he be  
19 retained as Monitor; in those circumstances we really do  
20 think that going back again -- and, remember, going back to  
21 this District Court, we really have to understand that every  
22 time attorneys file a motion in this case, they really are  
23 putting themselves on the line. We've had Department --  
24 civil division --

25 JUDGE GINSBURG: You're a stand-up guy, Mr. Stern.

1 MR. STERN: Excuse me?

2 JUDGE GINSBURG: You're a stand-up guy.

3 MR. STERN: And this is the Court I stand up in,  
4 Your Honor.

5 JUDGE GINSBURG: Judge Randolph, further  
6 questions? Judge Henderson, questions?

7 We've more than used your time, Mr. Stern, but  
8 we'll give you adequate time for rebuttal.

9 MR. STERN: Thank you very much.

10 MR. LEVITAS: May it please the Court, I'm  
11 accompanied -- my name is Elliott Levitas, and I represent  
12 the appellees in this matter. I'm accompanied today by Mr.  
13 Bill Austin and Mr. Keith Harper.

14 I'd like to start off by simply reminding the  
15 Court what it has already held in an earlier visit, and that  
16 is that this is a trust case. It involves the obligations  
17 and the duties of a trustee. This is not your usual APA  
18 agency review.

19 This Court has specifically held, for example,  
20 that chevron deference is not owed in this case. The Court  
21 has already held that the test by which the duties of the  
22 appellants must be gauged are fiduciary standards, and  
23 that's a higher and stricter standard. And this Court has  
24 already held that extensive malfeasance by the trustee  
25 delegates warrants more judicial oversight and involvement



1 than would usually be the case, and that is what we find  
2 here.

3 Now, this -- we believe that the threshold issue  
4 in this case is the jurisdiction of this Court. We believe  
5 that the orders which were issued by the District Court on  
6 September 17th were interlocutory in nature. They were  
7 either contempt orders -- civil contempt orders, or they  
8 were case management orders, or they were scheduling orders.

9 JUDGE GINSBURG: Why civil, as opposed to criminal  
10 contempt?

11 MR. LEVITAS: That's what the Court held. If it  
12 were criminal contempt -- if the Court had found criminal  
13 contempt, then clearly there would have been a right of  
14 appeal at this point.

15 JUDGE GINSBURG: Well, what -- the Court used the  
16 word civil, but I'm not sure that we're imprisoned by that  
17 if it's functionally criminal.

18 MR. LEVITAS: The question --

19 JUDGE GINSBURG: The question is who is to be the  
20 master; the words or the people?

21 MR. LEVITAS: We have asked for both civil and  
22 criminal contempt citations, Your Honor. The Court granted  
23 only the civil contempt.

24 JUDGE GINSBURG: The Court used the word "civil"  
25 and did not use the word "criminal", but tell me why it's

1 civil? The hallmark of a civil contempt is, as Mr. Stern  
2 said, referring I think to the Fox treatise about 160 years  
3 ago, that the contempner has the keys to the cell in his  
4 pocket, right? You can comply and be discharged from the  
5 contempt -- purged. That doesn't seem to be the case with  
6 respect to events which have been closed out that are in the  
7 past.

8 MR. LEVITAS: Your Honor, that is certainly one of  
9 the purposes of civil contempt. And I would suggest that  
10 that -- even that purpose is found here, because the Court  
11 uses the civil contempt as a means of prodding the  
12 defendants in this case to do what he has ordered them to  
13 do, to do what the statute requires, to do an accounting.

14 JUDGE GINSBURG: What's the civil penalty?

15 MR. LEVITAS: The civil penalty in this case is  
16 the appointment of Special Masters, it could be compensatory  
17 in terms of the expenses and attorney's fees which the  
18 plaintiff's have had to incur as the result of the  
19 misconduct and the contempt of the defendants. And, in that  
20 regard, I'd like to turn to a question --

21 JUDGE GINSBURG: So, that's -- that's the extent  
22 to which then the Secretary is under a continuing burden.  
23 That is to say there's no per diem fine here --

24 MR. LEVITAS: No.

25 JUDGE GINSBURG: -- there's no incarceration, but

1 there are the mounting expenses of the Special Master, is  
2 that it?

3 MR. LEVITAS: That would be -- that would be one,  
4 Your Honor. I can conceive that if there is continuing and  
5 further misconduct that leads to further contemptuous  
6 actions, there could be criminal contempt with the  
7 sanctions --

8 JUDGE GINSBURG: All right, well let me ask you --  
9 as to certain of the five specifications, let me ask you  
10 with regard to numbers two and three. It says Defendant  
11 Norton and McCaleb, etcetera, decreed to be in civil  
12 contempt of court for committing a fraud on the court by  
13 concealing the Department's true actions regarding the  
14 historical accounting project during the period from March,  
15 2000 until January, 2001.

16 Now, that's essentially -- that is prior -- in its  
17 entirety prior to the defendant -- or, the official  
18 defendants, Norton and McCaleb, taking office.

19 MR. LEVITAS: Yes, Your Honor --

20 JUDGE GINSBURG: So, that's -- what can they do to  
21 purge a contempt that was begun and completed before they  
22 arrived in town?

23 MR. LEVITAS: The -- in the case of successor  
24 responsibility, institutional responsibility --

25 JUDGE GINSBURG: Even if it were the same

1 individual. I'm not asking -- it's a flavor enhancer that  
2 the personnel changed. The point is the conduct was over.  
3 So, how can one call it civil contempt and purge one's self  
4 of the contempt if it's already over and done?

5 MR. LEVITAS: The civil contempt was perpetrated  
6 by the, at that time, holder of this institutional position.  
7 In fact, I call to the Court's attention that when you --  
8 when this Court issued its last opinion in this case, it was  
9 a decision in the case of Cobell v. Norton, and all of the  
10 acts that took place in that case has occurred prior to the  
11 new Secretary having taken office.

12 JUDGE GINSBURG: Well, I'm not sure, Mr. Levitas,  
13 whether I'm making myself clear or I'm unclear or I'm too  
14 clear, but you're not answering the thing I'm interested in.

15 Suppose that it were still Babbitt, and Babbitt is  
16 told, "You're in contempt for something that you did between  
17 March of 1999 and January of -- March of 2000 and January of  
18 2001. How can then be construed as a civil contempt?

19 MR. LEVITAS: To the extent, Your Honor, that the  
20 conduct resulted in causing the plaintiffs in this case  
21 expense and other delay in achieving the accounting, it is  
22 civil because the Court could, by virtue of this imposition  
23 of the sanction, prod the institution to do what it was  
24 ordered to do.

25 JUDGE GINSBURG: Well, there are other

1 specifications that might fit that description that have to  
2 do with some ongoing efforts required of the Department.  
3 But at least with respect to some of these specifications,  
4 it seems to be matters entirely in the past in which case  
5 there's no doubt about our interlocutory appellate  
6 jurisdiction.

7 MR. LEVITAS: No.

8 JUDGE GINSBURG: Want to go to the merits?

9 MR. LEVITAS: May I -- I wanted to pick up on one  
10 point that the Court expressed some interest in during Mr.  
11 Stern's argument and see if we can dispose of that.

12 It was whether or not the Monitor could be  
13 appointed over the objection of the -- of the defendants in  
14 this case. And they clearly had established conditions and  
15 other activities. There's a simple answer to that, and it  
16 was not cited by the defendants in their briefs, and yet  
17 it's right here in the order -- the consent order that  
18 originally appointed the Court Monitor. The very first para  
19 -- numbered paragraph --

20 JUDGE GINSBURG: Where is this to be found?

21 MR. LEVITAS: It's the order of -- consent order  
22 of April 16th, 2001.

23 JUDGE GINSBURG: Where do I find it?

24 MR. LEVITAS: I can supply that, Your Honor. I  
25 don't have the joint appendix referenced, but it is the

1 consent order. And -- which originally appointed the Court  
2 Monitor, and the first paragraph says that the Monitor shall  
3 serve for at least one year, and then after comment or  
4 objection thereto -- after comment or objection thereto by  
5 the party, his term of service may be extended for  
6 additional terms.

7 JUDGE RANDOLPH: It's Volume 6, counsel, at Page  
8 3825 is what you're reading.

9 MR. LEVITAS: Thank you. And I don't know how you  
10 could be any clearer than that. It is --

11 JUDGE RANDOLPH: Where are the terms of the  
12 Department's consent?

13 MR. LEVITAS: The terms --

14 JUDGE RANDOLPH: Original consent.

15 MR. LEVITAS: -- of the Department -- this was a  
16 consent order and, in fact, this particular proposal was  
17 actually urged by the defendants and was opposed by the  
18 plaintiffs.

19 JUDGE GINSBURG: Now, this was an appointment for  
20 one year, right?

21 MR. LEVITAS: That's appointment for one year --  
22 at least one year --

23 JUDGE GINSBURG: Yeah, well -- where are these --  
24 what paragraphs -- who -- terms?

25 MR. LEVITAS: This is the first numbered

1 paragraph.

2 JUDGE GINSBURG: For at least one year from this  
3 date --

4 MR. LEVITAS: And then it goes on, as Your  
5 Honor --

6 JUDGE GINSBURG: -- extended for additional -- may  
7 be extended for additional terms. Okay.

8 MR. LEVITAS: After comments or objection. It  
9 specifically contemplated that there may be objection.

10 JUDGE RANDOLPH: So, you're saying the Department  
11 consented to having this individual serve for more than one  
12 year, even if they objected?

13 MR. LEVITAS: That's what the order says; yes,  
14 Your Honor. That's exactly what it says, and it's strange  
15 that that point was not made by the defendants when -- in  
16 discussing this question of appointment.

17 JUDGE GINSBURG: Well, it's strange to me that you  
18 didn't have an answer in the red brief. You didn't say  
19 anything in this brief responding to their point.

20 MR. LEVITAS: We have a footnote in the brief,  
21 Your Honor, that indicated that there was contem -- it was  
22 contemplated that the Court Monitor could be reappointed.

23 JUDGE GINSBURG: Over objections --

24 JUDGE RANDOLPH: Well, no one disputes that. No  
25 one disputes that.

1 JUDGE GINSBURG: Notwithstanding the objections of  
2 the government.

3 MR. LEVITAS: I don't believe we used those  
4 precise words --

5 JUDGE GINSBURG: Yeah, well that's what we've been  
6 chasing around here looking for our tails for the last few  
7 minutes.

8 JUDGE RANDOLPH: So your position is that the  
9 government -- the Department consented to the appointment of  
10 a Monitor even if it -- in the future even if the government  
11 would not consent? That's your point --

12 MR. LEVITAS: Yes, Your Honor. I'm saying that's  
13 what the order explicitly says.

14 JUDGE RANDOLPH: That's a rather odd government  
15 position, isn't it? We consent even if we don't.

16 MR. LEVITAS: Well, Your Honor --

17 JUDGE RANDOLPH: That's the nature -- that's your  
18 argument.

19 MR. LEVITAS: The government -- the Justice  
20 Department attorney representing the government at that time  
21 actually stood in court in his place and expressed his  
22 appreciation to the Judge for this order. The government  
23 wanted this order.

24 JUDGE RANDOLPH: Well, it doesn't say consent  
25 decree, and it's not signed by the parties.



1 MR. LEVITAS: There has been no question that this  
2 particular --

3 JUDGE RANDOLPH: And the government's position  
4 here is that this individual had a one-year term and if we  
5 objected to his reappointment, then --

6 MR. LEVITAS: I'm aware of that -- that's their  
7 position, and I'm suggesting to Your Honor that that is  
8 inconsistent with the consent order that the government  
9 actually proposed at the time of our -- and agreed to at the  
10 time of original appointment.

11 JUDGE RANDOLPH: Well, if this individual could  
12 serve only with the consent of the parties, then -- and one  
13 of the parties revokes their consent, then on what authority  
14 does a Court have to continue the individual's service;  
15 that's the question?

16 MR. LEVITAS: I get back to that paragraph. I  
17 don't --

18 JUDGE RANDOLPH: No, no, no. Forget about the  
19 paragraph. If the party is appointed with the consent --  
20 or, the individual is appointed with the consent of the  
21 parties and one of the parties revokes that consent midway  
22 through, what -- on what authority -- what legal authority  
23 does the Court have to say I don't care, I hereby appoint  
24 this individual for life, or whatever?

25 MR. LEVITAS: I would suggest to the Court that in

1 the appointment of a Court Monitor -- not under Rule 53, but  
2 the appointment of a Court Monitor, it would require the  
3 consent of the parties, but that consent is not --

4 JUDGE RANDOLPH: So your only position is they  
5 gave their consent.

6 MR. LEVITAS: They gave their consent.

7 JUDGE RANDOLPH: All right.

8 MR. LEVITAS: And if they hadn't -- if that  
9 provision were not there, Your Honor, then the appointment  
10 of the Court Monitor or any other official would be  
11 meaningless, because whenever that individual got hot on the  
12 trail and found something that was disturbing and  
13 embarrassing to one of the parties, they'd just pull the rug  
14 out from under that official.

15 JUDGE RANDOLPH: Right. Right.

16 MR. LEVITAS: And that was certainly not what was  
17 contemplated, and that's why this language appears in the  
18 order.

19 JUDGE RANDOLPH: The Monitor is given the  
20 authority to get into deliberations of the Department,  
21 right?

22 MR. LEVITAS: The -- invited to get in. In fact,  
23 the Secretary of Interior, after the appointment of the  
24 Court Monitor, sent out a memorandum explaining to the  
25 employees of the Department that they were to cooperate and

1 meet with the Court Monitor and have these discussions. In  
2 fact, one of the interesting things, if anybody should have  
3 an objection to the so-called ex parte discussions, it would  
4 seem it would be the plaintiffs; not the defendants. It was  
5 the defendants and their employees who had the opportunity  
6 to have private conversations with the Court Monitor to  
7 which the plaintiffs were not party. There were ongoing  
8 discussions between employees in the Department and high  
9 officials in the Department, which the plaintiffs were not  
10 present. And if anybody should have an objection, it would  
11 be the plaintiffs; not the -- not the defendants.

12 But I just wanted to make that point at the outset  
13 because it was clear that it was a matter of some concern to  
14 the Court.

15 There was another --

16 JUDGE GINSBURG: As long as we're at this point,  
17 even at this early stage, let me ask you about the related  
18 question -- pardon me -- of the elevation of Mr. Kieffer to  
19 the Special Master position. Now, that -- he was charged  
20 with supervising the discovery process, correct?

21 MR. LEVITAS: That's correct.

22 JUDGE GINSBURG: So, there's no doubt that he  
23 would be functioning there as a judicial officer.

24 MR. LEVITAS: First of all, every -- every action  
25 taken by the Court Monitor -- Master at that point is

1 governed by Rule 53. It is an open process. It's on the  
2 record. The witnesses are subject to cross-examination.  
3 All the protections are in place.

4 And furthermore, a point that we -- that I should  
5 bring out, is that the review by -- the review by this Court  
6 of that decision is a review that is based upon abuse of  
7 discretion. The decision about appointment of a Special  
8 Master is one that is made by the trial court and is  
9 reviewed for abuse of discretion. In this instance, the  
10 Court Monitor became a Special Master Monitor and became  
11 subject to all of the protections that that provides.

12 JUDGE GINSBURG: Now, does that mean that the  
13 government is not in a position to move for recusal, or to  
14 object to the appointment of this particular individual  
15 because of his prior involvement in the case? Because now  
16 that he'll be presiding, it will be subject to open  
17 procedures?

18 MR. LEVITAS: I -- I believe, Your Honor, that the  
19 defendants in this case have a right to move for recusal.  
20 That's not what they are doing here. They are objecting to  
21 the appointment.

22 JUDGE GINSBURG: Objecting to the appointment on  
23 the basis of Section 455, though, right?

24 MR. LEVITAS: But Section 455 -- the type of ex  
25 parte information that was provided to this Special Master

1 or this Monitor, as he was at the time, is not the type of  
2 personal knowledge that transgresses Rule 45 -- I mean,  
3 Section 455. The -- everything the Court Monitor did was a  
4 matter known to the defendants in this case, because that's  
5 with whom he was having his ex parte conversation, which, by  
6 the way, makes it totally different from the case of  
7 In re: Edgar where the Judge in that case was having  
8 unconsented ex parte conversations not with the people who  
9 were objecting, but with the experts themselves. In this  
10 case, the consent to have ex parte was given to the Court  
11 Monitor, and to have those ex parte conversations with the  
12 plaintiffs in the -- with the defendants in this case.

13 JUDGE GINSBURG: One of those ex parte contacts  
14 would have been the meeting of April 19th, is that correct?

15 MR. LEVITAS: I'm sorry, Your Honor?

16 JUDGE GINSBURG: One of the ex parte contacts  
17 including the meeting of April 19th?

18 MR. LEVITAS: Yes, Your Honor. A meeting that was  
19 requested by the defendants.

20 JUDGE GINSBURG: Now, as I understand it, at that  
21 meeting Mr. Kieffer advised individuals from the Department  
22 of Interior that they were not getting good legal advice.

23 MR. LEVITAS: That was certainly set forth in one  
24 of the affidavits that I read.

25 JUDGE GINSBURG: Okay, and that legal advice would

1 have been coming from whom?

2 MR. LEVITAS: I'm not quite sure; probably the  
3 Solicitor's Office in the Department.

4 JUDGE GINSBURG: Somebody in the Executive Branch  
5 of the United States Government.

6 MR. LEVITAS: That is correct.

7 JUDGE GINSBURG: Who would then be a party  
8 appearing before Mr. Kieffer under Rule 53.

9 MR. LEVITAS: That situation, Your Honor, is  
10 protected by the fact that everything -- every ruling that  
11 the Special Master Monitor makes -- and there wasn't even a  
12 Special Master Monitor, nor were there any discovery  
13 proceedings he was presiding over at that time. But every  
14 ruling he makes is subject to review. And any --

15 JUDGE GINSBURG: Mr. Levitas, but bear in mind  
16 that 455 applies to all judicial officers. So, if your  
17 interpretation is correct, presumably a District Judge newly  
18 appointed, previously serving in the Department of Justice,  
19 could preside over a case in which he had had a -- some kind  
20 of contact, as long as it's all known to the other side.

21 MR. LEVITAS: Well, I would call the Court's  
22 attention to the Liteky case, which we discuss in our brief.  
23 And that was a case in which a District Judge had presided  
24 over a trial involving Liteky and had formed some very  
25 strong opinions about Mr. Liteky. And then in the second

1 trial, the defendant sought to --

2 JUDGE GINSBURG: Right. Right.

3 MR. LEVITAS: -- recuse and disqualify, and the  
4 Court held --

5 JUDGE GINSBURG: But the objection in the -- the  
6 objection went to matters occurring before the Judge in his  
7 -- as a judicial officer; not in his pre-judicial  
8 manifestation, correct?

9 MR. LEVITAS: That is correct.

10 JUDGE GINSBURG: Right. So, I mean that seems to  
11 be quite a different situation. It didn't meet the standard  
12 for -- the Court said for mandating recusal. The Judge  
13 formed opinions in the course of the first trial. We often  
14 have second trials. I supposed somebody who gets a Judge  
15 reversed in a criminal case, and then goes back for a  
16 retrial isn't exactly glad to see the same Judge there,  
17 right?

18 MR. LEVITAS: And --

19 JUDGE GINSBURG: But that's the way it works.

20 MR. LEVITAS: That's the way it works.

21 JUDGE GINSBURG: Right. Okay, now but if -- but  
22 I'm talking about somebody who, in his non-judicial  
23 capacity, prior to becoming a judicial officer, has an  
24 involvement with the matter now being presented to him as a  
25 judicial officer.

1 MR. LEVITAS: Your Honor, in -- at the time this  
2 April 19th meeting occurred, at the request -- occurred at  
3 the request of the defendants in this matter, Mr. Kieffer  
4 was not a Special Master at that time. He was not  
5 exercising any judicial functions.

6 JUDGE GINSBURG: He was the Monitor.

7 MR. LEVITAS: He was a Monitor.

8 JUDGE GINSBURG: Right. Well, like a Judge who  
9 was then a prosecutor.

10 MR. LEVITAS: But in that instance, the purpose of  
11 appointing the Court Monitor, again with the consent of and  
12 indeed at the request of the defendants, was for the purpose  
13 of monitoring the actions of trust reform.

14 And another point that I think is crucial --

15 JUDGE GINSBURG: Mr. Levitas, let me ask you this.  
16 The -- is Mr. Kieffer presiding over discovery matters --

17 MR. LEVITAS: Yes --

18 JUDGE GINSBURG: -- as this goes on?

19 MR. LEVITAS: -- and all of his rulings are  
20 subject to review and most of them, in fact, have been  
21 reviewed -- since this appeal was filed in early December,  
22 there have been, as I recall it, three other appeals filed  
23 with this Court on rulings made by Mr. Kieffer as Special  
24 Master.

25 JUDGE GINSBURG: Is that supposed to be a



1 consolation to us?

2 MR. LEVITAS: It's a -- it's not a consolation to  
3 the plaintiffs in this case, I can tell you that, but -- and  
4 there also, as has been alluded to, five mandamus petitions  
5 pending. And my guess is, Your Honor, there are going to be  
6 more. And, in fact, that ties back in to our view of the  
7 case from the -- looking at the strategy of the government,  
8 it's to delay. We believe this appeal was brought primarily  
9 for the purpose of delay. That's what this case is all --

10 JUDGE RANDOLPH: What did it delay?

11 MR. LEVITAS: What did it delay? Getting on with  
12 the accounting, doing what needs to be --

13 JUDGE RANDOLPH: How does this appeal delay  
14 getting on with the accounting?

15 MR. LEVITAS: This appeal --

16 JUDGE RANDOLPH: This appeal involves attorneys  
17 and this Court. The attorneys that are representing the  
18 individuals that are before us and the Department are not  
19 doing the accounting, are they?

20 MR. LEVITAS: No, Your Honor.

21 JUDGE RANDOLPH: So, then how does this appeal  
22 delay anything?

23 MR. LEVITAS: Because you were talking about --

24 JUDGE RANDOLPH: I mean, that's a serious charge.  
25 What you're saying, counsel, is that this appeal was taken

1 not because the government thought it had merit, not because  
2 the individual officers who were held in contempt thought  
3 they shouldn't, but it was done to delay things, and I'm  
4 asking you to back that up, because I don't see it.

5 MR. LEVITAS: Okay, the reason, Your Honor, is  
6 that you described the resources that are available to the  
7 government. They've got one team of lawyers here who are  
8 working on this appeal. They've got another team of lawyers  
9 that are handling the trial. They've got another team of  
10 lawyers that are working on the accounting. The plaintiffs  
11 don't have that luxury.

12 JUDGE RANDOLPH: That's not my question. How is  
13 this delaying the accounting --

14 MR. LEVITAS: Because the resources -- and the  
15 Court has found -- the trial court has found that actions  
16 which require the plaintiffs to divert their resources --

17 JUDGE RANDOLPH: Like a 29-day contempt trial?

18 MR. LEVITAS: Like a 29-day contempt trial --

19 JUDGE RANDOLPH: Do you think that delayed the  
20 accounting?

21 MR. LEVITAS: No, I don't. I think that's the  
22 reason we're going to have an accounting if -- when this --  
23 if this Court affirms that, because without that, there  
24 wouldn't be an accounting. And what this Court -- what the  
25 trial court did is set up a series of procedures which will

1 assure that the accounting now goes forward, without which  
2 that wouldn't have occurred.

3 And -- and for that reason, Your Honor, those --  
4 those scheduling orders, case management orders is what the  
5 trial court issued. If those had simply been implemented,  
6 then the plaintiffs in this case would not have had to spend  
7 this period of time dealing with this appeal, of  
8 interlocutory orders, dealing with another five or six  
9 mandamus petition, two more appeals, three more appeals that  
10 are now pending in this case on evidentiary rulings made by  
11 the Special Master Monitor.

12 And -- and it seems to me that what Judge Lamberth  
13 has set out to do was to accept the fact -- or, determine  
14 that there had not been significant -- indeed, any progress  
15 made towards doing what was required to be done by the  
16 December 21st, 1999 order. And so he came back and said,  
17 "I've got to do something to move this along", and that's why  
18 he entered the scheduling orders that he entered; that's why  
19 he called for the submission of the two plans to the Court.  
20 Those things were necessary in order to get this accounting  
21 done; to get the trust fixed. And without that type of  
22 scheduling order and case management order we would still  
23 be, as was said, at the starting gate.

24 And it is for that reason that the court below  
25 issued these orders, and they are interlocutory in nature;

1 they deal with case management; they deal with with  
2 scheduling; they deal with matters that are routinely  
3 handled in an interlocutory fashion. And for that reason,  
4 Your Honor, we believe that what the Court has attempted to  
5 do -- the trial court has attempted to do is find a way to  
6 break the jam that has kept an accounting from being done.

7 Keep in mind that the -- the decision that the  
8 Court made -- this Court made in 2001 was based on a record  
9 that was completed in August of 1999. So here we are in  
10 2003 looking at a situation where little or nothing has been  
11 done in order to bring about trust reform, in order to  
12 accomplish the accounting to which our clients are entitled  
13 and have not yet received.

14 I'd like, if I may --

15 JUDGE GINSBURG: If you want to make a last point,  
16 briefly, we'll give you time for that.

17 MR. LEVITAS: The last point I'd like to make,  
18 Your Honor, is this. That there have been delays -- undue  
19 delays which this Court has acknowledged in its former  
20 opinion. There's been malfeasance. There's been  
21 intransigence. The only way that this case will move  
22 forward to a conclusion is for this Court to issue an  
23 opinion which makes it clear that this Court will not  
24 tolerate further undue delay and will require the government  
25 to do what it hasn't done for 130 years.

1 JUDGE GINSBURG: Thank you, Mr. Levitas.

2 MR. LEVITAS: Thank you.

3 JUDGE GINSBURG: Mr. Stern?

4 MR. STERN: May it please the Court, I'd like to  
5 sort of address the big picture point that Mr. Levitas was  
6 just addressing and then I just wanted to say something very  
7 briefly about the Court Monitor issue again.

8 On the big picture point about the accounting,  
9 what we have not had here is a case about unreasonable  
10 delay. This was a contempt trial. What the evidence that  
11 we lay out, and particularly in a lot of detail in our reply  
12 brief, but also in our opening brief, shows is that even  
13 prior to this Court's decision in this case, the Department  
14 had moved actively ahead with an accounting plan, that  
15 Secretary Norton moved ahead actively, that even the Court  
16 Monitor, who was almost unremittingly hostile to the  
17 government in this case, had acknowledged that the newly  
18 established Office of Historical Trust Accounting had done  
19 more in six months than the previous administration had done  
20 in six years; that we had clear -- that there was a clear  
21 time table ahead for doing the accounting, and just at the  
22 very eve of the contempt trial, before hearing any evidence  
23 in this case, Judge Lamberth announced to the parties that  
24 the use of statistical sampling, which had always been a  
25 crucial element of the attempt to deal with the land-based

9 And right now, what the Department cannot do  
10 really is to move forward with any of it -- we can do a lot  
11 of things, but we can't really move forward because the  
12 District Court has said, "You give those plans to me; I'll  
13 be deciding what happens." And what we know is that for the  
14 foreseeable future that if the Department, say, decides  
15 that, "I'm going to try and go ahead right now with  
16 statistical sampling before getting your next opinion" --

21 MR. STERN: Yes. I mean, it's the first that I've  
22 heard of it and the -- the District Court, in its orders --  
23 I note one of them, JA 6875, the Court's proposing the  
24 extension of the Monitor. The Court never indicated that it  
25 believed it had received a blanket check from the

1 government --

2 JUDGE RANDOLPH: It does say at least one year.

3 It doesn't say --

4 MR. STERN: Though it does say one year, but it  
5 also clearly contemplates objections, and the government,  
6 you know, would not have, you know -- you know, engaged to  
7 appoint a Monitor regardless of what the Monitor did or what  
8 its experience was, you know, for the indefinite future, you  
9 know or for -- you know, both on the basis of its intrusion  
10 and also the extraordinary cost that's been -- this Monitor  
11 has received over \$1 million. I mean, this is quite an  
12 extraordinary thing that's been happening and the government  
13 did not consent to that in perpetuity. And one thing we  
14 also note --

15 JUDGE RANDOLPH: Where can we find something in  
16 the record to back up your statements that the government  
17 did not consent?

18 MR. STERN: Well, Your Honor, since this has been  
19 an argument made, I haven't marshaled all of this, but I do  
20 think that Judge Lamberth's own opinions in which he  
21 proposes an extension, sort of indicate that the Judge was  
22 aware that this was going to have to be an ongoing process.

23 JUDGE GINSBURG: Well, but that's not inconsistent  
24 with saying at the initial order, upon order of the court,  
25 after comment or objection thereto by the parties, his term

1 of service may be extended. In other words, he seems to be  
2 saying before I extend the service, I'm going to hear from  
3 you, but not necessarily treat that as dispositive.

4 MR. STERN: But this is an order of the Court and  
5 if the government is not consenting -- I mean, our point  
6 would simply be this; that --

7 JUDGE GINSBURG: Well, but this order -- this 2001  
8 order opens with the recitation -- "Order: With the consent  
9 of the plaintiffs and the Interior defendants." And that's  
10 when he makes the initial appointment.

11 MR. STERN: No, that's right. But what we  
12 understand that to be that we were consenting for a year,  
13 and the point would be that you can't have a Monitor or a --  
14 you can't have somebody performing a judicial function of  
15 this kind unless he is either a judicial officer or the  
16 parties are presently consenting. And even if this were  
17 thought to be ambiguous to suggest that the government would  
18 have to deal with Mr. Kieffer on that basis because the  
19 Court -- because of the way the Court phrased its own order  
20 would be wrong. And --

21 JUDGE GINSBURG: Well, could you then, as Judge  
22 Randolph suggested earlier, withdraw your consent at any  
23 time during the year as well?

24 MR. STERN: I think we could have withdrawn our  
25 consent; yes, you know, and -- but -- but what we know is we



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14 MR. STERN: Your Honor, this is very much not  
15 signing a lease. It was an extraordinary intrusion. The  
16 government tried to limit it and when we moved to revoke his  
17 appointment, we did so on the basis of behavior -- the  
18 behavioral objections which the District Court clearly  
19 understood and which it rejected and if this Court finds  
20 that the behavioral objections are sufficient to have  
21 required Mr. Kieffer's recusal from these roles, then that  
22 is clearly something the District Court has ruled on and  
23 rejected.

24 JUDGE RANDOLPH: Again, what Judge Lamberth said  
25 in response to your behavioral objections?

1 MR. STERN: Excuse me, Your Honor?

2 JUDGE RANDOLPH: Would you remind me again what he  
3 said in response to your behavioral objections?

4 MR. STERN: He said that our motion failed of its  
5 own mendacity, and that the Court was personally aware of  
6 the conversations of April 19th and --

7 JUDGE RANDOLPH: How did the Court become  
8 personally aware of the conversations?

9 MR. STERN: We --

10 JUDGE RANDOLPH: Is there any indication that --

11 MR. STERN: Well, there is an indication in the  
12 Court's January order denying the recusal motions from the  
13 individual plaintiffs in which that very issue is raised by  
14 petitioners. The Judge responds and he -- I won't try to  
15 paraphrase what the Judge said, but it's all laid out in F.  
16 Supp. 2d there and -- but what the bottom line is, it leaves  
17 no doubt that the personal knowledge is, in fact, a  
18 conversation with the Court Monitor. So, that it's kind of  
19 a double problem. I mean, the Court looks at it, doesn't --

20 JUDGE RANDOLPH: Well, is that a 455 problem? I  
21 mean, you have a Judge saying on the record that he has  
22 personal knowledge of facts that are in dispute?

23 MR. STERN: Yes. We've said --

24 JUDGE RANDOLPH: But here -- it's a 455 problem  
25 here.

1 MR. STERN: But we think it's a --

2 JUDGE GINSBURG: Your objection is not to Judge  
3 Lamberth's personal knowledge; it's to Mr. Kieffer's.

4 MR. STERN: No, that's -- well, we also think that  
5 -- and what we have said -- is that to the extent that the  
6 Judge was basing his ruling on the motion to revoke on  
7 personal knowledge, that that also raised the kind of  
8 problem the 7th Circuit was dealing with in In re: Edgar, so  
9 you sort of have that -- there are sort of multiple layers  
10 of this problem.

11 JUDGE GINSBURG: If you want to invoke 455 with  
12 respect to Judge Lamberth, surely you have to go back.

13 MR. STERN: We have not asked the Court at this  
14 time to recuse Judge Lamberth.

15 JUDGE GINSBURG: I didn't think so, but you were  
16 muddying the waters a little bit there.

17 MR. STERN: Well, I stand by what we said in our  
18 brief, Your Honor.

19 JUDGE GINSBURG: Any further questions? Thank  
20 you, Mr. Stern. Mr. Levitas, thank you.

21 The case is submitted and the Court will take a  
22 brief recess.

23 CLERK: Stand, please. The Honorable Court will  
24 now take a brief recess.

25 (Whereupon, oral argument was concluded.)

CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Judith A. Downey  
Judith A. Downey

5/9/03

Date